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November 3, 2011

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, DISH Network, LLC
CG Docket No. 11-50
Petition for Declaratory Ruling Concerning The Telephone
Consumers Protection Act (TCPA)

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the undersigned counsel hereby provides notice that on November 1, 2011, DISH Network LLC ("DISH Network") met with the following FCC personnel in connection with the proceeding identified above: Jessica Almond of Chairman Julius Genachowski's office, Jacob Lewis of the Office of General Counsel, William Freedman and Deborah Ford of the Consumer and Government Affairs Bureau. In attendance on behalf of DISH Network were Jeffrey Blum, Senior Vice President and Deputy General Counsel, Alison Minea, Corporate Counsel; Steven A. Augustino and Alysa Z. Hutnik, Kelley Drye & Warren LLP.

During the meeting, and consistent with its comments and reply comments filed in this proceeding, DISH Network encouraged the FCC to conclude that the TCPA does not hold businesses liable for unlawful telemarketing calls that are initiated or made by independent third parties. These arguments were consistent with those provided at pages 12-16 of DISH Network's May 4, 2011 Comments in this proceeding.

DISH Network further added that, alternatively, if the FCC were to conclude that the TCPA did provide for some type of third-party liability, in such a situation, the federal common law of agency is the governing standard for determining how to apply such third-party

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liability to a given set of facts because the TCPA is a federal statute and “generally intended to have uniform nationwide application” and there is a “danger that ‘the federal program would be impaired if state law were to control’” interpretation of a federal law. *See Brief for the FCC Amici Curiae*, 6th Cir., Docket No. 09-4525, pp. 13-14 (Nov. 15, 2010), citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989); *Jerome v. United States*, 318 U.S. 101, 104 (1943); *United States v. Jackson*, 401 F.3d 747, 749 (6th Cir. 2005). The federal common law of agency test involves a list of factors, but primarily focuses on whether the principal directed and controlled the manner and means of the agent’s conduct at issue to be legally responsible for such conduct. The U.S. Supreme Court’s decision in *Community for Creative Non-Violence v. Reid* (“CCNV”), 490 U.S. 730 (1989), sets forth the factors to be considered.

DISH Network urged the Commission to cite the CCNV factors and to clearly state that liability could attach only if the alleged principal directed and controlled the purported violative conduct. Such an outcome would provide the necessary clarity for businesses operating nationwide and, as described more fully in the attached response, would be consistent with the consumer protection aims of the TCPA.

During the meeting, DISH Network was asked for its reaction to recent *ex parte* filings submitted by the Federal Trade Commission (“FTC”) on October 20, 2011, and the U.S. Department of Justice (“DOJ”) on October 25, 2011 and October 26, 2011. As is more fully explained in the attached response, DISH Network explained that the existing federal common law of agency would provide the needed uniformity and predictability for businesses and consumers, without sacrificing consumer protection aims. The FCC should not create a new standard, as urged by the FTC and DOJ, because, as an initial matter, such a deviation from federal common law would abrogate common law rights without a clear direction from Congress to do so. Supreme Court precedent is clear that Congress’s silence on a subject cannot be taken as an inference to apply an unusual modification to common law rules. A statute must expressly address the issue if it is to abrogate a common-law principle. *Meyer v. Holley*, 537 U.S. 280, 286 (2003) (explaining that where Congress has not expressly addressed third party liability, then “Congress’ silence, while permitting an inference that Congress intended to apply ordinary background tort principles, cannot show that it intended to apply an unusual modification to those rules”). Further, creating a new standard of third-party liability here, and thus, setting aside the federal common law of agency, would lead to more litigation, not less, and likely would lead to future referrals to the Commission to explain the new standard.

DISH Network further stated that the CCNV factors do not need modification or additional explanation as applied in the telemarketing context. If, however, the Commission were to entertain the DOJ’s and FTC’s suggestion for further clarity in how the federal law of agency would apply in a telemarketing context, the Commission should address its discussion within the context of how the agency principles outlined in CCNV apply in a telemarketing context, rather than create a new standard. It should not adopt factors that subject businesses to

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strict liability for the telemarketing actions of third parties that are not under a business's direction and control.

Sincerely,

A handwritten signature in black ink, appearing to read "Steven A. Augustino". The signature is fluid and cursive, with the first name "Steven" and last name "Augustino" clearly legible.

Steven A. Augustino
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SAA:pab

cc: Jessica Almond
Jacob Lewis
William Freedman
Deborah Ford